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In the Supreme Court
of the United States

OCTOBER TERM 1969

No. 983

EDWIN HARLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusion	6
Appendix A—Opinion of the United States Court of Appeals	9

TABLE OF CASES

Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963)	6
Interlake Steamship Co. v. Nielsen, 338 F.2d 879 (C.A. 6th, 1964)	6
Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960)	6

TABLE OF STATUTES

Title 28, U.S.C.A., Section 1254(1)	2
Title 28, U.S.C.A., Section 1291	2
Title 46, U.S.C.A., Section 688	2, 5, 6
Title 46, U.S.C.A., Section 740	3, 6
Title 46, U.S.C.A., Section 741	2
Title 50 App., U.S.C.A., Section 1291	2

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TO the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, EDWIN HARLING, plaintiff-appellant below, respectfully prays a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on September 22, 1969.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court is reported at 416 F.2d 405 and is appended at page 9.

JURISDICTION

Jurisdiction of the U. S. District Court for the District of Oregon is based on Title 46, U.S.C.A. § 741, original jurisdiction under the Suits in Admiralty Act by virtue of the Clarification Act, Title 50, App. U.S.C.A. § 1291.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, U.S.C.A. § 1291.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Does the doctrine of unseaworthiness in Admiralty jurisdiction extend to a seaman's contacting dengue fever by reason of a mosquito bite occurring ashore while the seaman was in the service of the vessel,

STATUTES INVOLVED

46 U.S.C.A. § 688:

§ 688. *Recovery for injury to or death of seaman*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

46 U.S.C.A. § 740:

§ 740. *Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period*

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where

the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496.

STATEMENT OF THE CASE

Appellant, plaintiff, a merchant seaman became ill with a tropical disease known as dengue fever on December 10, 1966, in Singapore. Dengue fever is endemic to that area (Tr. 80). Appellant had signed foreign articles on November 28, 1966, for a voyage return and was flown to and arrived in Singapore on approximately December 1, 1966 (Tr. 4). When appellant arrived in Singapore he stayed the first two nights at a hotel, then two nights on a vessel and the next four nights at the Seaman's Club (Tr. 8); during that period of time appellant worked on the vessel during the day, however ate his meals ashore (Tr. 19-22). The employer provided bus transportation ashore and paid for the meals; no meals were served on the vessel (Tr. 57). After work a bus would

transport appellant to uptown Singapore at 4:30 p.m. (Tr. 21). The employer also paid appellant's hotel expense (Tr. 18).

A domesticated mosquito known as the Aedes Aegypti is the vector in Asian urban areas of dengue fever (Tr. 73). In the Singapore area one of the peak times of the day during the month of December that the Aedes Aegypti would bite was just before sunset, 5:00 to 5:00 p.m. (Tr. 79). The concentration of Aedes Aegypti occurred in the highly congested area of uptown Singapore (Tr. 77).

In entering judgment in favor of appellee the district court held that the ship was live and ready to move during the period applicable herein, however that appellant might just as well have contracted dengue fever in uptown Singapore or any other place than on the ship (Tr. 82). Had the court found liability it would have allowed damages in the amount of $1,600 special damages and $2,500 general damages, a total of $4,100 (Tr. 83).

The United States Court of Appeals for the Ninth Circuit affirmed holding that the doctrine of unseaworthiness does not extend to injuries caused by instrumentalities ashore having no connection with the vessel (Appendix A).

REASONS FOR GRANTING WRIT

The question presented is of great concern to injured seamen. 46 U.S.C. § 688 has made it clear that

an injured seaman shall have all the rights and remedies of an injured railroad employee in a federal employers liability case. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

The Admiralty Extension Act, 46 U.S.C.A. § 740, extended admiralty jurisdiction to damages caused on land by maritime events. *Interlake Steamship Co.* v. *Nielsen*, 338 F.2d 879 (C.A. 6th, 1964). The passage of the Admiralty Extension Act of 1948 removed any prior limitation on the doctrine of unseaworthiness pertaining to the physical agency of the vessel or particular part of it and extended admiralty jurisdiction and its applicable doctrine to damages or injury notwithstanding that such damage or injury be done or consummated on land. *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963).

The decisions in the courts below fail to apply the warranty of seaworthiness to injuries occurring on land while in the service of the vessel as contemplated by 46 U.S.C.A. 688 and 46 U.S.C.A. 740 and the applicable case law above cited.

CONCLUSION

It is important that this Court protect the right of an injured seaman to recover for personal injuries sustained ashore while in the service of a vessel, and therefor petitioner respectfully prays that his petition

for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWIN HARLING,)
Appellant,)
vs.) No. 22,970
UNITED STATES OF AMERICA,)
Appellee.)

[September 22, 1969]

Appeal from the United States District Court
District of Oregon

Before: MADDEN,* Judge of the United States Court of Claims, MERRILL and CARTER, Circuit Judges.

PER CURIAM:

Appellant, a seaman on a United States vessel, brought this action for damages based on the alleged unseaworthiness of the vessel.

Appellant's theory as formalized by a pretrial order was that while sleeping on the vessel in Singapore, he was bitten by a mosquito and contracted dengue fever; that the vessel was unseaworthy in that it did not have screens on the portholes to the room in which he slept.

The trial court found against appellant on the facts: that there was no custom or requirement for screens; that appellant did not carry his burden of

proof as to proximate cause; that appellant might have contracted the fever in town rather than on the ship; and that the particular mosquito will not bite at nighttime.

After the court's decision the appellant moved to amend the findings, conclusions of law and judgment, and the pretrial order to include another theory, to-wit that the ship carried the disease of dengue fever. This theory was no more valid than the first theory. The motion was denied.

The case was tried on the theory outlined in the pretrial order. Counsel, after trial and an adverse decision, was properly denied leave to amend.

The doctrine of unseaworthiness does not extend to injuries caused by instrumentalities ashore having no connection with the vessel. *Morales* v. *City of Galveston*, (1962) 370 U.S. 165, 171.

The judgment is Affirmed.

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* Hon. J. Warren Madden, Senior Judge, United States Court of Claims, sitting by designation.